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IN THE

Supreme Court of the United States

October Term, 1966

THE FLYING TIGER LINE INC., *Petitioner,*

v.

CHARLES S. MURPHY, ET AL., as individuals and as members of the CIVIL AERONAUTICS BOARD, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, The Flying Tiger Line Inc., prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 2, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is reprinted at Appendix A, p. 1a below. The opinion of the United States District Court for the District of Columbia is reported at 244 F. Supp. 889 (D.D.C. 1965). The opinion and regulation of the

Civil Aeronautics Board (hereafter referred to as "Part 207") of which Petitioner sought review by the District Court and by the Court of Appeals below are printed in the Board's Economic Regulations and Economic Regulations Preambles (29 Fed. Reg. 13246, 14105; 14 C.F.R. 207). The opinion of the District Court and the opinion and regulation of the Board are reprinted in the Joint Appendix printed for the use of the Court of Appeals (J.A. pp. 15 *et seq.*; 105 *et seq.*).*

JURISDICTION

The judgment of the Court of Appeals (Appendix A, p. 1a below) was entered on June 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board misconstrued Section 401(e)(6) of the Federal Aviation Act, which authorizes air carriers holding route certificates to perform charter services, in confining this section of the Act to "off-route" charters only, with the result that the Board's Economic Regulation (Part 207) governing charter services imposed an unlawful discrimination between all-cargo carriers and combination carriers in the performance of passenger charters.

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* Nine additional copies of the Joint Appendix have been filed with this Court for use in passing upon the Petition. See Rule 21(3) of the Court's Rules. "J.A." citations are to this Joint Appendix. Petitioner has also filed with this Court all relevant portions of the record made before the Board in the rule-making proceeding that resulted in the issuance of Part 207. This five-volume record was part of the record in the case before the District Court and before the Court of Appeals. Citations thereto appear herein as "Tr. ——."

2. Whether Part 207, issued after a rule-making proceeding under the Board's authority pursuant to Section 401(e)(6) to regulate charter services, so restricts and discriminates against the all-cargo carriers as to destroy the statutory rights to perform charter services that Section 401(e)(6) grants to them.

3. Whether Part 207 should be stricken as arbitrary and capricious because the purported basis and purpose upon which the Board promulgated the regulation is totally unsupported by any information adduced in the rule-making proceeding.

4. Whether the Board, or any administrative agency, may take action based upon a rule-making proceeding alone to deprive common carriers holding certificates of public convenience and necessity of rights that the governing regulatory statute incorporates into those certificates, when the statute provides that a certificate can be amended or modified only upon specific findings by the agency after notice and an evidentiary hearing.

STATUTES AND REGULATIONS INVOLVED

The provisions of the Federal Aviation Act, the Motor Carrier Act and the Administrative Procedure Act principally involved are set forth in Appendix B, pp. 2a *et seq.* below.

STATEMENT

Transporation services by air carriers may be divided broadly into two major categories: scheduled services and charter services. This case presents important questions of law concerning the regulation by the Civil Aeronautics Board of the second of these major categories of air transportation.

In charter service a carrier employs its aircraft between specific points under contract with specific

parties for specific occasions. Scheduled service, on the other hand, is provided at set times over routes that the Board has awarded to specified carriers—the "route" carriers—under certificates of public convenience and necessity. Passengers and cargo are carried in both categories of service. Charter services are conducted by the "route" carriers as well as by a separate group of "supplemental" carriers who engage in no scheduled services.

Charter services are a large source of revenue for many route carriers. Charter revenues contribute critically to the financial stability and economic viability of one particular group of four relatively small route carriers. These are the all-cargo carriers of whom Petitioner is one.* It is against these carriers that the adverse economic impact of the decisions below strikes heavily. Their certificates grant them routes only for the transport of property and mail and not—as is the case with the certificates of the "combination" carriers—for the transport of passengers as well. Passenger and cargo charter services by the cargo carriers are essential for the economic utilization of their equipment and to enable them to compete effectively

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* One of these, Slick Corporation, received Board approval in August 1965 to suspend its scheduled service because of that carrier's serious financial difficulty. Slick Corporation, Suspension of Scheduled Route Service, Order E-23352 C.A.B. Dkt. No. 16356, March 14, 1966 (continuing suspension). Airlift International, Inc., another all-cargo carrier, and Slick have applied to the Board for the transfer of Slick's certificate to Airlift to enable the latter carrier to operate Slick's route. Application of Airlift International, Inc., and Slick Corporation, C.A.B. Dkt. No. 17622, August 12, 1966. Airlift has so far been denied permanent route authority for the reason, among others, that the Board considers that it, too, is in financial difficulty. Airlift Renewal Proceeding, Order E-24032, C.A.B. Dkt. No. 11749, June 30, 1966; Examiner's Decision, March 22, 1966.

with the cargo operations of the combination carriers.* In 1964, for example, Petitioner's charter services (other than military charters) represented 16% of its total annual revenues, the loss of which would have caused a substantial operating loss for the year (J.A. 54).

In September 1964, following a rule-making proceeding and without an evidentiary hearing, the Civil Aeronautics Board revised Part 207 of its Economic Regulations, which govern the charter services of the route carriers. In describing the proposed regulation, the Board recognized its broad impact on the air transportation industry when it stated: "Part 207 is a major regulatory proposal which could have a significant effect with respect to all classes of carriers."** The Board's statement was amply borne out as to the cargo carriers, for the effect of the revised Part 207 was to deprive them almost entirely of their much-needed charter revenues. The Board thereby placed in serious jeopardy the ability of these carriers to grow and develop in competition with the combination carriers and the supplemental carriers.

To secure judicial review of this alarming action by the Board, Petitioner brought suit in the District Court for declaratory judgment and injunction to set aside key portions of Part 207 and to challenge the

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* See, generally, Schary, P., *Competition, Regulation and the Air Freight Industry*, 30 J. Air L. & Commerce 62, 66 (1964); opinion of dissenting Board Member Gurney in the Part 207 rule-making proceeding (J.A. 40).

** Supplemental Notice of Proposed Rule-Making and Notice of Oral Argument, EDR-48F and PSDR-8D, June 22, 1964 (29 Fed. Reg. 8121).

Board's administrative procedure in promulgating the regulation (J.A. 2 *et seq.*).*

The complaint objected to Part 207 chiefly on the ground that the restraints it imposed on charter services by Petitioner—and by the other all-cargo carriers—so restricted and so discriminated against the carriers as to be openly at odds with the express statutory grant of charter authority contained in the Federal Aviation Act, Section 401(e)(6) of the Act. That section, as amended by Congress in 1962 specifically at the urging of Petitioner, among others, had enlarged the charter authority of the route carriers. P.L. 87-528, 76 Stat. 143. The amendment authorized any such carrier to provide charter services "without regard to . . . the type of service" named in its certificate, thus adding to the route carriers' long-standing authority to conduct charters "without regard to the points named in its certificate."** The language of the 1962 amendment,

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* The district courts and not the courts of appeals have jurisdiction of such a suit in the first instance. The original jurisdiction of the latter is confined to proceedings seeking judicial review by "orders" of the Board. By contrast, "regulations" of the Board, issued after a rule-making proceeding that does not encompass an evidentiary hearing, are reviewable initially in the district courts by a suit for injunctive relief. Arrow Airways v. Civil Aeronautics Board, 87 U.S. App. D.C. 71, 182 F. 2d 705 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 828 (1950); Utah Gas Pipeline Co. v. Federal Power Commission, 86 U.S. App. D.C. 314, 181 F. 2d 796 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 827 (1950); Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, as amended, 49 U.S.C. § 1486.

** Section 401(e)(6) reads in its entirety:

> "Any air carrier, other than a supplemental air carrier, may perform charter trips or any other special service, without regard to the points named in its certificate, or the type of service provided therein, under regulations prescribed by the Board."

Petitioner believed, authorized the all-cargo carriers to engage in passenger charters as well as cargo charters. That right previously had been denied to them under Section 401(f) of the Civil Aeronautics Act of 1938, the earlier statutory provision governing charter services.

In adopting revised Part 207, the Board (in a 3-2 decision, Members Gurney and Gilliland dissenting) used its power under Section 401(e)(6) to "prescribe regulations" that effectively reversed the action of Congress by continuing, for all practical purposes, the exclusion of passenger charters and limiting drastically even cargo charters by the all-cargo carriers. The Board construed Section 401(e)(6), as it had done previously,* as authorizing only "off-route" charters—that is, between points that are not on a carrier's certificated route (J.A. 16, 22). The Board then proceeded to define passenger charters by the cargo carriers as "off-route" whether or not such a charter was performed over the carrier's certificated route (J.A. 32). In addition, the Board limited each carrier's annual "off-route" charter mileage—whether passenger or cargo (except military charters)—to 2% of its annual total revenue plane miles flown "on-route" in scheduled services.

As a consequence, all passenger charters by the cargo carriers fell within the 2% restriction while passenger charters by combination carriers over their certificated routes were in no way restricted. And the 2% restric-

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* ER-375, March 26, 1963, 28 Fed. Reg. 3078; Notice of Proposed Rule-Making, EDR-48B, January 13, 1964, 29 Fed. Reg. 1476.

tion was calculated for the all-cargo carriers on the basis of their scheduled service miles only, even though these carriers had comparatively little scheduled service mileage. On the other hand, the combination carriers typically had enormous scheduled service traffic and could anticipate year-to-year increases that made the 2% limitation unimportant.*

Under Section 4 of the Administrative Procedure Act (Appendix C, p. 11a), the Board was required to provide a "statement of [Part 207's] basis and purpose." Only one consideration appears from the Board's opinion that could reasonably be cited as the "basis and purpose" of the regulation. The Board stated that its restrictions on charter services by certificated carriers were designed to assure that these carriers "do not place undue emphasis on charter operations in derogation of their obligation to perform adequate scheduled service" (J.A. 17). Yet the Board neither cited in its opinion nor had presented to it in the rule-making proceeding even one instance of threatened or actual deterioration of route service by any certificated carrier as a result of charter operations. Petitioner itself has never been the object of any complaint alleging inadequacy of scheduled service (J.A. 49-50, 55).

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* The Board also authorized the all-cargo carriers to conduct unrestricted cargo charter services in their "designated geographic area of service [or operations]" (J.A. 22). For Petitioner, the Board determined this area to be the contiguous 48 states, but it also awarded this "area of operations" to two of the other all-cargo carriers. Apparently because no U.S. all-cargo carriers are certificated for the Pacific, Africa, Middle East and South Asia areas, the Board neglected these "areas of operations." Cargo charters in these areas accordingly remain "off-route" and are subject to the 2% restriction.

No economic or industry analysis or other expressions of administrative expertise supported the Board's attempted explanation of the 2% restriction—except that this figure represented a "historical balance between the route carriers' route [scheduled] services and off-route charters" (J.A. 18). Nothing appears in the opinion to suggest that the Board considered other reasonable alternatives. Nowhere did the Board consider the adverse impact the 2% restriction would have on the ability of the all-cargo carriers to use their operating equipment effectively and economically. No justification was given for the uneven, crippling effect of the 2% restriction on the cargo carriers as compared to its bland impact on their major cargo competitors, the combination carriers.

Petitioner's complaint in the District Court sought to set aside the crippling provisions of Part 207 on several grounds. Petitioner asserted: (1) that the Board lacked statutory authority to restrict passenger charters by cargo carriers over their certificated routes without similarly restricting the combination carriers (J.A. 6-7); and (2) that the 2% limitation imposed by the Board was tantamount to a proscription of all charter services by the cargo carriers, such as Petitioner, whose "economic survival in the immediate future is directly dependent upon continuation of revenues from such charter operations" (J.A. 11). It was further alleged that no information was presented in the rule-making proceeding that bore any reasonable relationship to the Board's stated "basis and purpose" in promulgating Part 207, and that the regulation accordingly should be enjoined as arbitrary and capricious for this separate reason (J.A. 8-10).

The complaint also asserted that Part 207 was invalidly issued on the independent ground that the regulation effected modifications in Petitioner's certificate of public convenience and necessity which could lawfully be brought about only by an adjudicatory proceeding, as provided for by Section 401(g) of the Aviation Act (49 U.S.C. § 1371(g)). This section contemplates the holding of an evidentiary hearing and the creation of a formal record of witness and documentary evidence that will permit effective judicial review of agency action. Sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C. §§ 1004, 1006. The route carriers, including Petitioner, voiced these objections to the Board in the course of the rule-making proceeding (J.A. 19-20; Tr. 1436).

Petitioner's objection to the administrative procedures followed by the Board presents a question that is on all fours with the chief question now being presented by other petitioners in this Court—certain combination carriers—in a related case decided by the court below *en banc, American Airlines, et al.* v. *Civil Aeronautics Board* (Nos. 18,833, 18,834, 18,840, U.S. App. D.C. 1966), No. 304, October Term, 1966 (petition for writ of certiorari filed June 30, 1966). That petition asks the Court to review, *inter alia*, whether the Board should have held an evidentiary hearing prior to the issuance of Part 399, a Board "Policy Statement" having essentially the effect of a regulation, that authorized the use of certain cargo tariffs, known as "blocked space" tariffs, by the all-cargo carriers but denied these tariffs to the combination carriers. The Board's Policy Statement on "blocked space" and its revised Part 207 regulation governing charter services were promulgated as a consequence of the same rule-making pro-

ceeding; there was a common notice of proposed rule-making, a joint hearing and a joint record.*

The District Court rejected Petitioner's challenges to Part 207 and to the administrative procedure followed by the Board. Granting the Board's motion to dismiss the complaint, the court ruled that Part 207 did not exceed the Board's statutory authority under Section 401(e)(6) of the Aviation Act to "prescribe limitations and qualifications" on charter services. (J.A. 109); that because Part 207 affected an entire class of air carriers rather than particular members, an adjudicatory hearing was unnecessary (J.A. 109); and that Part 207 did not discriminate against the all-cargo carriers but only created a reasonable classification as between them and other carriers (J.A. 110). In treating Petitioner's claim that no information had been adduced in the rule-making proceeding that could sustain Part 207's stated "basis and purpose," the District Court appeared to conclude that no such information was required, although its opinion is unclear on this point (J.A. 110).

The Court of Appeals affirmed the judgment of the District Court in a *per curiam* opinion (Appendix A, p. 1a below) stating that it was "in general agreement" with the opinion of the District Court. In disposing of Petitioner's contention that Part 207 had been invalidly issued absent an adjudicatory hearing, the court cited its decision in the "blocked space" case (see p. 10 above).

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* See Notice of Proposed Rule-Making, EDR-48, November 13, 1962, 27 Fed. Reg. 11322 (Tr. 8-11); Notice of Proposed Rule-Making, EDR-48B and PSDR-8, January 13, 1964, 29 Fed. Reg. 1476 (Tr. 182-198).

REASONS FOR GRANTING THE WRIT

The Civil Aeronautics Board's revised Part 207 will have far-reaching significance in shaping the extent and nature of charter service by United States air carriers in coming years by fixing the rights of the cargo, combination and supplemental carriers to compete in this important market. In promulgating Part 207, the Board acted on the basis of its reading of the provision of the Federal Aviation Act—Section 401(e)(6)—that delineates the scope of the Board's power to regulate this important segment of air transportation. The Court of Appeals and the District Court, in sustaining the Board's reading of the Act, decided an important question of Federal law involving the charter service rights of the different classes of carriers that has not been, but should be, settled by this Court.

Petitioner additionally submits that there exist conflicts with controlling decision of this Court in the rulings by the courts below that Part 207 was within the Board's power to prescribe regulations for charter services, that the Board had before it information adequate to sustain the stated "basis and purpose" for the regulation, and that the Board had properly refused an adjudicatory hearing in connection with the issuance of Part 207.

A. The Board's Narrow Reading of Section 401(e)(6) of the Federal Aviation Act Discriminates Against the All-Cargo Carriers in Favor of the Combination Carriers.

The Board and the all-cargo carriers have long disagreed over whether Section 401(e)(6) of the Aviation Act authorizes the carriers to perform charters over their certificated routes as well as "off-route," or whether the section grants only "off-route" charter

rights. No judicial decision construing the Federal Aviation Act or its predecessor statute, the Civil Aeronautics Act, has passed on this question. Yet the issue is one of significance in the intense competition between the all-cargo carriers and the combination carriers for charter revenues. And it promises to become increasingly important as the all-cargo carriers progressively extend their route structures under certificates that may be awarded in proceedings now pending before the Board.* For in that event, if the Board's reading of Section 401(e)(6) stands, passenger charters over the cargo carriers' new routes will continue to be treated as "off-route" and, therefore, subject to the severe 2% restriction of Part 207.

The Board's position that Section 401(e)(6) is confined to "off-route" charters underlies this major element of Part 207. The Board asserts that the authority of a certificated carrier to conduct "on-route" charters is a part of the bundle of rights the Board grants to a route carrier in its certificate—and does not derive from the statutory authority of Section 401(e)(6). For this reason, the Board concludes, all-cargo carriers, who uniformly lack authority to provide route passenger service, likewise lack authority to conduct passenger charters over their routes except as the Board may determine in regulations, such as Part 207, issued pursuant to Section 401(e)(6).

With this reading of the section, the result, as we have already shown (p. 7 above), is that the 2%

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* There are now pending applications by cargo carriers for major routes between the United States and points in the Pacific Ocean area, Southeast Asia (including India and Pakistan) and Canada.

restriction of Part 207 applies to passenger charters by the cargo carriers over their certificated routes but not to comparable charters of the combination carriers. If, on the other hand, Section 401(e)(6) were construed to grant both on-route and off-route charter authority, the Board could not sustain its distinction between passenger charters by the cargo carriers and by the combination carriers. For in such a case the operative language of Section 401(e)(6)—"without regard to the points named in its certificate, or the type of service provided therein"—would plainly compel the Board to deal even-handedly and without discrimination as between the two major classes of route carriers.

Considerations of statutory construction, precedent and legislative history strongly favor this Court's review of this question of law and the rejection of the view embraced by the Board and by the courts below.

1) The Board's position disregards the inter-relationship between the certificating provisions of the Aviation Act and those provisions—of which Section 401(e)(6) is one—that proscribe the Board from imposing terms and conditions in route certificates. In urging that Section 401(e)(6) embraces only off-route charter operations, the Board presumably would retain to itself, as part of its power to issue route certificates under Section 401(d) or to modify certificates under Section 401(g), the authority to bar a route carrier from conducting charters on-route. But no one—including the Board—has ever suggested that it has such authority. The Board could not, that is, delete from a route certificate the right to conduct on-route charters. The reason, however, is not that the Board is precluded

from doing so by Sections 401(d) or 401(g) of the Act but that Section 401(e)(6) withholds such power from the Board. Section 401(e)(6) itself grants charter authority to the route carriers and permits the Board only to "regulate" the exercise of that authority. The section is comparable in this respect to other portions of Section 401(e) of the Act that limit the Board's authority to impose terms and conditions in certificates. See Section 401(e)(2) (transport of foreign countries' mail); 401(e)(4) (change of schedules, equipment, facilities) (Appendix B, p. 5a below). So construed, Section 401(e)(6) and the certificating provisions of the Act fit together into a unified regulatory scheme.

2) Although no decisions under the Aviation Act illuminate with clarity the meaning of Section 401(e)(6),* a three-judge court in the Judicial Circuit

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* Early decisions of the Board indicated that it construed the predecessor of Section 401(e)(6)—Section 401(f) of the Civil Aeronautics Act of 1938 (Appendix B, p. 11a below)—as the source of authority for charter services by the route carriers. Western Air Corp.—Grandfather Certificates, 1 C.A.B. 39, 42 (1939); Pioneer Air Lines, Inc., 7 C.A.B. 469 (1942). One district court decision construing Section 401(f) stated that charter services by route carriers are "an expressly declared right granted, not by action of the Board, but by law"—that is, by Section 401(f) itself. Pacific Northern Airlines v. Alaska Airlines, 80 F. Supp. 592, 603 (D. Alaska, 1948).

The decision of the Court of Appeals below more than a decade ago in The Flying Tiger Line Inc. v. Civil Aeronautics Board, 92 U.S. App. D.C. 260, 204 F.2d 404 (D.C. Cir. 1953), although also involving the predecessor of Section 401(e)(6), was not concerned with whether the statutory provision embraced on-route as well as off-route charter services. This earlier case is of relevance now only because it clearly established that Section 401(f) did not encompass authority for passenger charters by the all-cargo car-

of the Court of Appeals below has interpreted the correlative provision of the Motor Carrier Act (54 Stat. 919, 49 U.S.C. § 301 *et seq.*) as Petitioner urges Section 401(e)(6) should be construed. Section 208(c) of the Motor Carrier Act, like Section 401(e)(6), appears in the portion of that regulatory statute treating the "terms and conditions of certificate[s]." Section 208 (c) authorizes any certificated motor carrier to transport "to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed" (Appendix B, p. 11a below). *Safeway Trails, Inc.* v. *Interstate Commerce Commission,* 176 F. Supp. 201, 204-05 (D.D.C. 1959), *aff'd per curiam,* 361 U.S. 86 (1960), construed Section 208(c) to be the statutory authority for motor carrier charter services under the Motor Carrier Act. In language that could be applied almost verbatim to the instant proceeding, the court ruled that the section precluded the Interstate Commerce Commission from imposing restrictions on charter services when it issues a route certificate to a motor carrier.

The Civil Aeronautics Act of 1938 was patterned upon the Motor Carrier Act, which had been enacted by Congress only three years earlier. Accordingly, the clear meaning that has been ascribed to Section 208(c) is persuasive in any search for the proper interpretation of Section 401(e)(6), the direct analogue for comparable charter authority in the Aviation Act.

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riers. *Whether* the cargo carriers are entitled to perform passenger charters was definitively settled with the passage of the 1962 Amendment that became Section 401(e)(6) and which contained the words "without regard to . . . the type of service." In dispute now is the equally critical issue of *how and the extent to which* cargo carriers shall be entitled to perform such charters; *i.e.,* whether the Board may cancel the statutory right in the guise of regulation.

3) Finally, the legislative history of the 1962 Amendment to the Aviation Act that became Section 401 (e) (6) indicates that the intent of Congress in enacting the words "without regard to . . . the type of service" was to place cargo carriers on an equal footing with combination carriers in performing charters. Senator Engle, the author of the 1962 Amendment, in a statement to the Senate, declared that the Amendment was intended to *"give to the cargo carriers the same authority enjoyed by passenger carriers in providing charter service of all types, no more and no less"* (emphasis supplied). 108 Cong. Rec. 11426.* This statement was adopted by Senator Monroney (*ibid.*), who was the floor leader in the Senate and who led the Senate conferees in the Committee of Conference which acted on the 1962 amendments for both houses of Congress.

Senator Engle subsequently wrote to the Board's Chairman further elaborating the intent of his amendment with particular reference to the Board's pro-

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* The relevant portion of Senator Engle's statement reads:

"Against heavy odds, the cargo carriers are building an air cargo industry for the United States, without Government subsidy. Their ability to develop this new business and to create new fleets of modern aircraft has been made possible in the main by their charter activities. Without the amendment to Section 401(e) of the Federal Aviation Act which is included in the bill before you, the cargo carriers would be the only carriers who would not be permitted to perform both cargo and passenger operations without applying to the CAB for exemptions. This bill as reported by the committee of conference will correct this situation and will give to the cargo carriers the same authority enjoyed by passenger carriers in providing charter services of all types, no more and no less." 108 Cong. Rec. 11426.

posed Part 207 regulation (J.A. 69-74). He took sharp issue with the Board's reading of Section 401 (e)(6) as confined to off-route charters. The letter expresses in simple and direct terms the deep concern of the author of the 1962 Amendment that the administrative agency was preparing—as it finally did—to use its authority to "regulate" charter service as a means of withholding the passenger charter rights Congress intended the cargo carriers to have. In sum, as Senator Engle feared, the Board has employed its on-route and off-route rationale to read back into Section 401(e)(6) the very discrimination against the cargo carriers that Congress sought to eliminate once and for all.*

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* In the proceedings below, the Board has been hard put to show that Section 401(e)(6) applies only to off-route charters. The Board has cited to a solitary word and no more. That is the word "off-route," which was employed in passing and without exegesis in the portion of the Conference Report treating the 1962 Amendment. See H.R. Conf. Rep. No. 1950, 87th Cong. 2d Sess., p. 12. The Board has also referred to a letter by Senator Cotton to the Board's Chairman (J.A. 103-04). This communication relies largely on the language of the Conference Report and does little more than restate the Board's own off-route and on-route rationale—essentially as we have explained it above (p. 13).

There is no greater merit in the Board's own additional reliance on the Conference Report in the proceedings below to establish that Congress intended to grant the Board discretion in authorizing the cargo carriers to perform passenger charters. In the face of the clear language employed by Senator Engle and embraced by Senator Monroney, the more persuasive view would appear to be that, whatever discretion the Board may have, it is not a discretion to issue regulations governing charters that grievously discriminate between the cargo carriers and the combination carriers.

B. Part 207 so Restricts and Discriminates Against the All-Cargo Carriers as to be Totally Destructive of the Statutory Rights to Perform Charter Services That Section 401(e)(6) Grants to Them.

This Court's decisions have long established that an administrative agency may not deny by rule or regulation what Congress has conferred by statute: The regulations of an agency issued pursuant to the statute it administers must carry out the legislative purposes of Congress—and not amend, alter or modify those purposes as the agency sees fit. See *Miller* v. *United States*, 294 U.S. 435 (1945); *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129 (1935); *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284 (1954); *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1945); *Helvering* v. *Credit Alliance Corp.*, 316 U.S. 107 (1941); *Lynch* v. *Tilden Produce Co.*, 265 U.S. 315 (1924); *International Ry Co.* v. *Davidson*, 257 U.S. 506 (1922).*

Decisions involving the Civil Aeronautics Board are in accord. In *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961), the Court commented that the Board is entirely "a creature of

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* In Manhattan General Equipment Co., *supra*, the Court declared (297 U.S. at p. 134-35):

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. . . . And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. . . ."

Congress" and the issue in any proceeding "is not what the Board thinks it should do but what Congress has said it can do." *Cf. Civil Aeronautics Board* v. *Summerfield,* 347 U.S. 924 (1954).

It is beyond any dispute here that Congress intended to authorize the route carriers to perform charter services. It is equally beyond dispute that in the 1962 Amendment to the Aviation Act that became Section 401(e)(6) Congress intended to enlarge the cargo carriers' existing right to perform cargo charters by adding the important further right to perform passenger charters. The sharp dispute in the instant proceeding is over whether the Board has blatantly thwarted these clear legislative purposes by imposing regulations which effectively destroy the charter rights Congress intended the cargo carriers to have.

Even brief analysis discloses that the Board's Part 207 has not "regulated" the charter operations of the all-cargo carriers but has for all practical purposes withdrawn their right to perform charters. The effect of the Board's 2% restriction on off-route charters by these carriers (which of course includes their on-route passenger charters) is devastating. Applied to Petitioner's scheduled service mileage of approximately 5,000,000 miles in 1964, for example, the restriction would preclude Petitioner from performing more than about 100,000 miles of off-route charters in 1965 (J.A. 48). This mileage—assuming it were all applied to passenger charters—would confine Petitioner to one and one-half round-trip coast-to-coast passenger charter flights per month.* Such "regulation" will mean

* This stark result was cited by dissenting Member Gurney. He concluded (J.A. 40): "In effect, this [2%] limitation will preclude the all-cargo carriers from engaging in any passenger business and for this reason [it] is an unreasonable restriction."

that Petitioner cannot retain the bare minimum of employees or services required for the performance of passenger charters or utilize effectively even one aircraft having the capability for passenger configuration (J.A. 40).

Petitioner would fare no better with cargo charters in international air transportation, the major market for such services. Between the Pacific area and the United States, for example, where charter flights of ten thousand miles are common, the Board's 2% restriction would enable Petitioner, again using its 1964 scheduled service mileage figures, to perform less than one charter (cargo or passenger) per month.*

These egregious results of the Board's effort to "prescribe regulations" pursuant to Section 401(e)(6) should not be permitted to stand. Certainly they are not explained by the brief remark of the District Court below that: "Some mathematical formula had to be contrived in order to effectuate [the regulation's] aim. The Board used its best judgment in devising one" (J.A. 111). In truth, such a "best judgment" can be understood only on one or both of two grounds: the Board either had no real understanding of what damage it was doing to the all-cargo carriers; or the Board deliberately embarked on a course designed to withdraw the statutory rights Section 401(e)(6) of the

* It is no solace to Petitioner and two other all-cargo carriers that the Board authorized them to perform unrestricted cargo charters within the contiguous 48 states (J.A. 22). The facts of life in the air cargo industry are that there is no significant market for cargo charters within the United States because the nation is so completely served by scheduled cargo and combination carrier routes. See Comments of Petitioner to the Board in the Part 207 rule-making proceeding, March 9, 1964 (Tr. 649, 659-61).

Act granted to these carriers to perform charter services.* In either case, the Board's actions can be permitted to go without further scrutiny by this Court only at the considerable risk of undermining the economic vitality of Petitioner and the other all-cargo carriers.

C. The Board had Before It in the Rule-Making Proceeding No Information Whatsoever That Could Sustain Its Stated Basis and Purpose for Promulgating Part 207.

American Trucking Associations v. *United States*, 344 U.S. 298 (1953), makes clear that the reasonableness of an administrative agency's regulations are to be tested on judicial review in the context of the information adduced in the agency's rule-making pro-

* Nor can Part 207's destruction of the charter rights of all-cargo carriers be sustained as an effort by the Board to protect the one class of carriers who were openly singled out for favor in the rule-making proceeding—the supplemental carriers (J.A. 18-19). A fair reading of the Board's opinion indicates that a major concern of the Board was to carve out and secure the charter market for the supplemental carriers. At one point, the Board stated that "the overriding consideration is the necessity of preventing undue impairment of the opportunity of the supplementals [carriers] to develop the charter market, . . ." (J.A. 19).

In the face of the clear and indisputable purpose of Section 401(e)(6), to authorize the route carriers to conduct charter operations, there is no basis in the Aviation Act for such preferential treatment by the Board. The Board's authority under Section 416(a) of the Act to create classes of carriers (Appendix B, p. 9a below) does not in itself justify action that withdraws statutory rights from other classes of carriers. To accomplish this result lawfully, the Board must rely upon other provisions of the Act that authorize it to make substantive preferential distinctions among carriers. Neither the courts below nor the Board have cited any such independent sources of statutory authority. Surely, the 1962 amendments to the Act—which first accorded the supplemental carriers certificate rights—do not sustain such a preference for this class of carriers to the detriment of other classes of carriers.

ceeding. In passing upon the lawfulness of trip leasing regulations issued by the Interstate Commerce Commission under the Motor Carrier Act, the Court in *American Trucking* undertook to consider "the existing conditions of the motor truck industry and its regulation as developed during the Commission's hearings because only against such a background are the rules meaningful" (*id.* at p. 302). The Court accordingly reviewed the information that had been developed in the rule-making proceeding (*id.* at pp. 302-08), and concluded that "the evidence marshalled before the Commission plainly supports the conclusion that the continued effectiveness of its regulation requires the rules prescribed" (*id.* at p. 314).

Tested by the standard of *American Trucking*, Part 207 cannot be sustained. The information before the Board in the Part 207 rule-making proceeding was plainly inadequate in light of the stated "basis and purpose" of the regulation. Part 207's chief purpose, the Board's opinion discloses (J.A. 17-18), was "to assure that the certificated carriers do not place undue emphasis on charter operations in derogation of their obligation to perform adequate scheduled service." Petitioner and the other route carriers might thus have anticipated that the Board would adduce some information to substantiate that charter operations were, at the very least, threatening to interfere in some way with the scheduled services of these carriers. Such was not the case, however. Board Member Gilliland stated in dissent (J.A. 36): ". . . [I]t is to be noted that instances of carrier neglect of their 'primary role' have not been adverted to."

The striking conclusion that emerges from careful study of the more than 1600 pages of comments and

memoranda submitted in the rule-making proceeding is that the record is utterly barren of any information suggesting that the route carriers' charter services adversely affected their scheduled operations.*

Petitioner's reliance upon *American Trucking* in the courts below was to no avail. The District Court, although not referring to this Court's decision and although its views on the instant question are unclear, appeared to interpret Petitioner's challenge to the adequacy of the rule-making record before the Board as a claim that valid rule-making requires "evidence formally presented at hearings" (J.A. 110). Petitioner made no such claim. Plainly, neither *American Trucking* nor any other precedent requires such an evidentiary hearing for a rule-making proceeding.

What *is* required is some reasoned, understandable relationship between why an administrative agency says it is issuing a regulation and the information underlying its decision to take such action. The gravamen of this aspect of Petitioner's challenge to Part 207 is that no such relationship can be shown.

D. The Court Should Review in this Proceeding and in American Airlines, et al. v. Civil Aeronautics Board, No. 304 of this Term, Whether the Board May Deprive Air Carriers of Certificate Rights on the Basis of a Rule-Making Proceeding in Lieu of the Adjudicatory Hearing Section 401(g) of the Federal Aviation Act Requires.

The Court now has before it the petition for a writ of certiorari to the Court of Appeals below filed in *American Airlines, et al.* v. *Civil Aeronautics Board,* No. 304, October Term, 1966 (commonly known as "the

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* As noted (p. 2, n. *), the record before the Board was available to the courts below and has been filed in this Court.

blocked space case"). The chief question presented by that petition, as we have noted (p. 10 above), parallels in significant respects the remaining question presented by this petition. That is, whether the Board, or any administrative agency, may act on the basis of a rule-making proceeding in lieu of an adjudicatory hearing to deprive common carriers holding certificates of public convenience and necessity of rights contained within their certificates.

Both Petitioner and the Board acknowledged in the Court of Appeals below that the court's *en banc* decision in the blocked space case disposed of the comparable question of administrative law and procedure presented in this case.* Moreover, the sole authority cited in the *per curiam* opinion of the court below in the instant proceeding is that court's *en banc* decision in the blocked space case. And the District Court below disposed of Petitioner's claim to an adjudicatory hearing on essentially the same reasoning as that of the Court of Appeals in the blocked space case—that no such hearing is required "if the impact of a ruling

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* See Brief for the Civil Aeronautics Board, No. 19869, U.S. App. D.C., p. 39; Reply Brief for Appellant The Flying Tiger Line Inc., No. 19869, U.S. App. D.C., p. 11. Petitioner initially urged in its brief in chief in the proceedings below that the blocked space decision of a panel of the court below, subsequently reversed by the court *en banc*, had decided in Petitioner's favor the question of whether an adjudicatory hearing was required in connection with the issuance of Part 207. Brief for Appellant The Flying Tiger Line Inc., No. 19869, U.S. App. D.C., p. 42.

or decision of the Board affects an entire class, rather [than] particular members of a group" (J.A. 109).*

Accordingly, in order to avoid burdening this Court with a duplication of the reasons for granting the writ contained in the petition filed in the blocked space case, Petitioner associates itself, for purposes of the question presented now under consideration, with the substance of the reasons set forth in that petition (at pp. 14-29) in support of the first question there presented. The authorities cited in the blocked space petition are equally compelling here. Petitioner respectfully requests the Court to treat those authorities for purposes of this case as if they are fully set forth herein.

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* Board Member Gilliland, dissenting, also treated the Board's blocked space ruling and its Part 207 determination as presenting the same question of whether an adjudicatory hearing was required (J.A. 37-38):

> "The Board cannot, in my judgment, legally juggle the rights of carriers in such fashion without an adjudicatory hearing. The fact that Part 207 is labeled rule-making is immaterial since it is well established that an agency may not change an adjudicatory matter to a rulemaking matter by the attachment of a label.
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> "It appears to me that the Board has, as it did by the issuance of *Part 399, Blocked-Space Service,* August 7, 1964, attempted to delineate the roles of the combination and the all-cargo carriers to such extent as to amend basic statutory and certificate rights without hearing. The statute clearly does not permit such action. . . . Such action can only be taken under section 401(g) 'after notice and hearing.'"

CONCLUSION

For the foregoing reasons, the writ of certiorari should issue.

Respectfully submitted,

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